

A **TAN JOO CHAI & ANOR v. ECO WATER TECHNOLOGIES
(M) SDN BHD**

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
ABDUL WAHAB PATAIL JCA

B AZIAH ALI JCA
[CIVIL APPEAL NO: J-02-881-04-2012]
6 JANUARY 2015

C ***COMPANY LAW: Directors – Breach of fiduciary duties – Joint ventures – Whether directors released payment according to joint venture agreements – Whether payments released in best interest of company – Whether directors acted dishonestly to siphon out company’s money – Whether directors used reasonable diligence in carrying out duties***

D The respondent company undertook joint venture projects (‘JV projects’), namely, (i) Projek Membina dan Menyiapkan Jalan Kesban Dan Jabatan Fasa (Segmen A) dari Pengkalan Kubor ke Kuala Jambu, Kelantan Darul Naim (‘the Kelantan Project’) with Tangkas Hadapan Sdn Bhd (‘Tangkas Hadapan’); and (ii) Projek Kumpulan Pendidikan YPJ, Mersing with Amirol Bakti Sdn Bhd (‘Amirol Bakti’). The claim by the respondent company against the appellants was founded upon the appellants’ alleged breach of fiduciary duty as directors of the respondent company in respect of the JV projects with Tangkas Hadapan and Amirol Bakti. The Kelantan Project was awarded by the Jabatan Kerja Raya (‘JKR’) to the main contractors. The main contractors sub-contracted the work to Tangkas Hadapan under a sub-contract agreement (‘the SCA’). Tangkas Hadapan subsequently entered into a joint venture with the respondent company (‘JVA’). Under the SCA between Tangkas Hadapan and the main contractors, a project account was opened into which progress payments received from the JKR was to be paid. Under the JVA between Tangkas Hadapan and the respondent company, it was agreed each party would contribute RM2 million. The respondent company commenced works and progress claims were submitted through Tangkas Hadapan and the main contractors to the JKR. However, when JKR made payment into the Project Account, the main contractors channelled the payments to another account. In light of the breach, Tangkas Hadapan ceased work under the SCA. To date, the RM2 million paid by the respondent company to Tangkas Hadapan had not been recovered. The respondent company contended, *inter alia*, that the haste in releasing the money to Tangkas Hadapan without taking any steps to safeguard the interests of the respondent company disclosed not only negligence but also a lack of *bona fide* on the part of the appellants. On the contrary, the appellants admitted making the payment without a director’s resolution to authorise the payment but believed the payment was in the best interests of the respondent company to secure the JV project. The High Court dismissed the respondent company’s

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claim in respect of the joint venture project with Amirol Bakti as the respondent company failed to prove its case against the appellants. However, the respondent company had proved breach of fiduciary duties by the appellants by approving and irresponsibly releasing a payment of RM2 million without the authority of the board of directors before entering into a binding and enforceable agreement with Tangkas Hadapan. Therefore, the High Court allowed the respondent company's claim in respect of the joint venture with Tangkas Hadapan and ordered the appellants to pay the respondent company the sum of RM2 million with interest at 4% per annum from the date of the writ until the date of payment with costs to be taxed ('the said order'). Aggrieved, the appellants appealed against the said order.

**Held (allowing appeal with costs; setting aside order of High Court)
Per Abdul Wahab Patail JCA delivering the judgment of the court:**

- (1) The fact of making payment of RM2 million on 11 April 2004 without a director's resolution authorising the same became immaterial when the shareholder's resolution made on 26 October 2004 authorised the execution of the JVA, which was signed on the same date. There was no evidence that Tangkas Hadapan denied receiving the money. Indeed the fact that the JVA came into being, and that the respondent company commenced work and progress claims were submitted, made it self evident that the payment played a role to lead to the JVA and the respondent company obtaining work. (para 11)
- (2) Problems arose when the progress payments from the JKR which were put into the project account was diverted by the main contractors contrary to their SCA with Tangkas Hadapan. It was not a dispute as to whether RM2 million was paid according to the JVA. In the fall out from Tangkas Hadapan ceasing to proceed with the main contractors, the JVA between the respondent company and Tangkas Hadapan came to nought. It was not the respondent company's case that even if the JKR progress payments were not diverted by the main contractors, the joint venture with Tangkas Hadapan would have failed. In the circumstances, the High Court clearly misappreciated the evidence before it. (para 11)
- (3) It is trite that doing business always involved an element of risk and that the cost of eliminating all risk may result in no profit left to be made. The fiduciary duties of directors were not so naively constructed that the directors were not only duty bound to take no risk, eliminate all risks but also must only ensure profits. Although the High Court did refer to the correct law as to the fiduciary duties of directors to act honestly, to use reasonable diligence, and in *bona fide* manner in the best interests of the company, the High Court allowed itself to be led astray by making the assessment upon hindsight. (paras 13 & 14)

- A (4) The appellants did not act dishonestly to siphon out the respondent company's money, or did not use reasonable diligence in carrying out their duties as directors. The appellants paid out RM2 million to Tangkas Hadapan to secure the contract, that the contract was awarded to the main contractors and a sub-contract was entered into with
- B Tangkas Hadapan, and for the performance of which the respondent company obtained a joint venture with Tangkas Hadapan. This eliminated any folly that may be attributed to making the payment without first ensuring the money went to the proper parties and a joint venture entered into. (para 14)

C *Bahasa Malaysia Translation Of Headnotes*

- Syarikat responden telah memasuki projek usahasama ('projek JV'), antaranya, (i) Projek Membina dan Menyiapkan Jalan Kesban Dan Jabatan Fasa (Segmen A) dari Pengkalan Kubor ke Kuala Jambu, Kelantan Darul Naim ('Projek Kelantan') dengan Tangkas Hadapan Sdn Bhd ('Tangkas Hadapan'); dan (ii) Projek Kumpulan Pendidikan YPJ, Mersing dengan Amirol Bakti Sdn Bhd ('Amirol Bakti'). Tuntutan syarikat responden terhadap perayu-perayu adalah berasaskan pelanggaran kewajipan fidusiari perayu-perayu sebagai pengarah syarikat responden berkenaan dengan Projek JV dengan Tangkas Hadapan dan Amirol Bakti. Projek Kelantan telah
- D diberikan oleh Jabatan Kerja Raya ('JKR') kepada kontraktor utama. Kontraktor utama telah memberikan sub-kontrak kerja-kerja kepada Tangkas Hadapan di bawah satu perjanjian sub-kontrak ('PSK'). Tangkas Hadapan kemudiannya memasuki satu perjanjian usahasama dengan syarikat responden ('PU'). Di bawah PSK antara Tangkas Hadapan dan kontraktor
- E utama, satu akaun projek telah dibuka di mana bayaran progresif yang diterima oleh JKR harus dibayar. Di bawah PU antara Tangkas Hadapan dan syarikat responden, adalah dipersetujui bahawa setiap pihak akan menyumbangkan RM2 juta. Syarikat responden telah memulakan kerja-kerja dan tuntutan bayaran progresif telah dikemukakan melalui Tangkas Hadapan
- F dan kontraktor utama kepada JKR. Walau bagaimanapun, apabila JKR membuat pembayaran ke dalam akaun projek, kontraktor utama menyalurkan bayaran tersebut ke dalam akaun yang lain. Disebabkan oleh kemungkiran tersebut, Tangkas Hadapan telah memberhentikan kerja-kerja di bawah PSK. Sehingga kini, RM2 juta yang dibayar oleh syarikat responden kepada Tangkas Hadapan belum dituntut kembali. Syarikat
- G responden menghujahkan, antara lain, bahawa kelakuan perayu-perayu yang tergesa-gesa mengeluarkan wang kepada Tangkas Hadapan tanpa mengambil sebarang langkah untuk melindungi kepentingan syarikat responden mendedahkan bukan sahaja kecuaiian tetapi juga ketiadaan *bona fide* pada pihak perayu-perayu. Sebaliknya, perayu-perayu mengaku membuat
- H pembayaran tanpa resolusi pengarah untuk membenarkan pembayaran, tetapi telah mempercayai bahawa pembayaran tersebut adalah dalam kepentingan terbaik syarikat responden untuk mendapatkan projek JV
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tersebut. Mahkamah Tinggi telah menolak tuntutan syarikat responden berkenaan dengan projek usaha sama dengan Amirol Bakti kerana syarikat responden gagal membuktikan kesnya terhadap perayu-perayu. Walau bagaimanapun, syarikat responden telah membuktikan pelanggaran kewajipan fidusiari oleh perayu-perayu dengan meluluskan dan melepaskan bayaran sebanyak RM2 juta dengan tidak bertanggungjawab tanpa kelulusan lembaga pengarah sebelum memasuki perjanjian yang mengikat dan boleh dikuatkuasakan dengan Tangkas Hadapan. Oleh itu, Mahkamah Tinggi telah membenarkan tuntutan syarikat responden berkenaan usahasama dengan Tangkas Hadapan dan mengarahkan perayu-perayu untuk membayar syarikat responden RM2 juta dengan faedah 4% setahun dari tarikh writ sehingga tarikh pembayaran dengan kos ditaksirkan ('perintah tersebut'). Terkilan, perayu-perayu merayu terhadap perintah tersebut.

Diputuskan (membenarkan rayuan dengan kos; mengeneipkan perintah Mahkamah Tinggi)

Per Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

- (1) Fakta pembayaran sebanyak RM2 juta pada 11 April 2004 tanpa resolusi pengarah yang memberi kuasa untuknya adalah tidak penting apabila resolusi pemegang saham yang dibuat pada 26 Oktober 2004 telah membenarkan pelaksanaan perjanjian PUS tersebut, yang telah ditandatangani pada tarikh yang sama. Tidak ada bukti bahawa Tangkas Hadapan menafikan penerimaan wang tersebut. Sesungguhnya fakta PU tersebut wujud, syarikat responden telah memulakan kerja-kerja dan tuntutan bayaran progresif telah dikemukakan, jelas menunjukkan bahawa bayaran tersebut telah memainkan peranan untuk membawa kepada pelaksanaan PU dan syarikat responden mendapatkan kerja.
- (2) Masalah timbul apabila bayaran progresif daripada JKR yang dimasukkan ke dalam akaun projek telah disalurkan oleh kontraktor utama bertentangan dengan PSK dengan Tangkas Hadapan. Ia bukan suatu pertikaian tentang sama ada RM2 juta telah dibayar berdasarkan PU. Oleh kerana Tangkas Hadapan berhenti meneruskan kerjanya dengan kontraktor utama, PU antara syarikat responden dan Tangkas Hadapan tidak menjadi kenyataan. Bukanlah kes syarikat responden bahawa walaupun bayaran progresif JKR tidak dialihkan oleh kontraktor utama, usahasama dengan Tangkas Hadapan akan gagal. Dalam keadaan ini, Mahkamah Tinggi dengan jelas telah gagal mempertimbangkan keterangan di hadapannya.
- (3) Adalah tidak dipertikaikan bahawa perjalanan perniagaan sentiasa melibatkan unsur risiko dan kos menyingkirkan semua risiko boleh menyebabkan ketiadaan keuntungan. Kewajipan fidusiari pengarah tidak ditafsirkan dengan begitu daif bahawa pengarah bukan sahaja terikat untuk tidak mengambil risiko, menyingkirkan semua risiko tetapi juga perlu memastikan keuntungan. Walaupun Mahkamah Tinggi merujuk

- A kepada undang-undang yang betul berkenaan kewajipan fidusiari pengarah untuk bertindak secara jujur, melaksanakan usaha yang munasabah, dan dengan cara *bona fide* demi kepentingan terbaik syarikat, Mahkamah Tinggi telah membenarkan dirinya terpesong dengan membuat taksiran berdasarkan imbasan lalu.
- B (4) Perayu-perayu tidak bertindak secara tidak jujur dalam mengeluarkan wang syarikat responden, atau tidak melaksanakan usaha yang munasabah dalam menjalankan tugas mereka sebagai pengarah. Perayu-perayu membayar RM2 juta kepada Tangkas Hadapan untuk mendapatkan kontrak, dan kontrak tersebut diberikan kepada kontraktor
- C utama dan sub-kontrak dibuat dengan Tangkas Hadapan, untuk membolehkan syarikat responden memperoleh usahasama dengan Tangkas Hadapan. Ini menghindarkan sebarang kesilapan yang mungkin berpunca akibat pembayaran tanpa memastikan terlebih dahulu bahawa wang tersebut disalurkan kepada pihak yang betul dan suatu usahasama
- D dimasuki.

Legislation referred to:

Companies Act 1965, s. 147(3)

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 13, pp 223, 224, 225, 226, 227, 228, 229, 230

- E *For the appellants* - Ng Chew Hor; M/s Ng, Fan & Assocs
For the respondent - T Gunaseelan (Nora Hayati Ismayatim with him); M/s Gunaseelan & Assocs

[Editor's note: Appeal from High Court, Johor Bahru; Civil Suit No: MT2-22-610-2008 (overruled).]

- F Reported by Sandra Gabriel

JUDGMENT

Abdul Wahab Patail JCA:

- G [1] The defendants Tan Joo Chai and Heng Peng Siang ("the appellants") appealed against the decision of the High Court in favour of the plaintiff Eco Water Technologies (M) Sdn Bhd ("the respondent company") in respect of alleged breaches of the appellants' fiduciary duties as directors of the
- H respondent company in relation to three projects undertaken by the respondent.

[2] At the conclusion of the trial, the High Court allowed the respondent company's claim and ordered the appellants to pay the respondent company the sum of RM2 million with interest at 4% per annum from the date of the writ until the date of payment with costs to be taxed.

- I **Background**

[3] The appellants were directors of the respondent company which was involved in joint ventures in three projects:

(a) Projek Membina dan Menyiapkan Jalan Kesban Dan Jabatan Fasa (Segmen A) dari Pengkalan Kubor ke Kuala Jambu, Kelantan Darul Naim (“the Kelantan project”) with Tangkas Hadapan Sdn Bhd (“Tangkas Hadapan”); A

(b) Projek Pembinaan Jeti Marina di Tanjung Gemok; and B

(c) Projek Kumpulan Pendidikan YPJ, Mersing with Amirol Bakti Sdn Bhd (“Amirol Bakti”).

[4] The claim by the respondent company was founded upon the appellants’ alleged breach of fiduciary duty as directors of the respondent company in respect of the joint venture projects with Tangkas Hadapan and Amirol Bakti. C

[5] The High Court found that in respect of:

(a) The joint venture project with Amirol Bakti, the respondent had failed to prove, upon a balance of probabilities, the alleged losses and that they were caused by the acts, omissions or breach of fiduciary duties of the appellants as directors of the respondent; and D

(b) The joint venture project with Tangkas Hadapan, the respondent had, upon a balance of probabilities proved breach of fiduciary duties by the appellants by approving and irresponsibly releasing the payment of RM2 million without authority of the board of directors and before entering into a binding and enforceable agreement with Tangkas Hadapan. E

[6] There is no appeal by the respondent against the dismissal of its claim in respect of the joint venture with Amirol Bakti. F

[7] The appellants appealed against the order to pay damages in the sum of RM2 million with interest at 4% from the date of the filing of the writ until full settlement, with costs in respect of the respondent company’s joint venture with Tangkas Hadapan.

[8] The Kelantan project was awarded through an acceptance of tender on 19 July 2004 by the Jabatan Kerja Raya (“JKR”) to Eight Ace Sdn Bhd and Arrem Corporation Sdn Bhd (“the main contractors”). The main contract between them was executed on 25 August 2004 with construction work to commence on 12 September 2004. The main contractors sub-contracted the work to Tangkas Hadapan under a sub-contract agreement (“the SCA”). Tangkas Hadapan subsequently entered into a joint venture with the respondent company. G
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Reasoning And Conclusion

[9] At para. 6 of its grounds of judgment, the High Court stated clearly that the only claim for breach of fiduciary duties of directors allowed by it was in respect of the payment of RM2 million to Tangkas Hadapan and that all the remaining items of claim were dismissed for insufficiency of evidence. I

A [10] The High Court found the appellants, as directors of the respondent company, caused the respondent company to pay the RM2 million to Tangkas Hadapan on the grounds:

(a) Facts:

- B (i) under the SCA between Tangkas Hadapan and the main contractors, a project account was opened into which progress payments received from the JKR was to be paid and Tangkas Hadapan together with the main contractors would be joint signatories of the account;
- C (ii) under the joint venture agreement between Tangkas Hadapan and the respondent ("the JVA"), it was agreed each party would contribute RM2 million;
- (iii) it was also agreed that the contribution by the respondent was to be repaid in priority to any other distribution of profits under the JVA;
- D (iv) the respondent commenced works and progress claims were submitted through Tangkas Hadapan and the main contractors to the JKR;
- (v) however, when JKR made payment into the project account, the main contractors, in breach of cl. 11 of the SCA, channelled the payments to another account opened by the main contractors;
- E (vi) in light of the breach, Tangkas Hadapan ceased work under the SCA; and
- (vii) to date, the RM2 million paid by the respondent to Tangkas Hadapan has not been refunded or recovered.
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(b) The particulars pleaded:

- (i) appellants made a payment of RM2 million to Tangkas Hadapan Sdn Bhd without ascertaining whether Tangkas Hadapan Sdn Bhd expended the money for the said project;
- G (ii) made the payment of RM2 million to Tangkas Hadapan Sdn. Bhd. even before a joint venture agreement is executed;
- (iii) incurring expenses in respect of the said project through a company called Khas Corporation Sdn Bhd, which has ties with Tangkas Hadapan Sdn Bhd before the said joint venture; and
- H (iv) failing to take appropriate steps to ascertain whether the money received by the joint venture was deposited in an account wherein the interest of the plaintiff would be protected.

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(c) Findings:

- (i) there were a directors' resolution and a shareholders' resolution both dated 26 October 2004 which authorised the entering into of the JVA and a shareholders' resolution also dated 26 October 2004 authorising entry into the JVA and appointing the first appellant as authorised representative of the respondent pursuant to s. 147(3) of the Companies Act 1965 to sign the JVA; A
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- (ii) but in respect of the RM2 million payment:
- (1) It was made more than seven months before the execution of the JVA and was without authority; C
- (2) Both appellants admitted making the payment without director's resolution to authorise the payment but believed the payment was in the best interests of the respondent company to secure the project and in any case it was a refundable sum; D
- (3) The payments under the JVA were to be made in equal amounts, and the appellants had not ascertained whether Tangkas Hadapan had also contributed to the project and how it had expended the money to secure the principal contract; E
- (4) There were no documentation made at the time of the payment showing the purpose of the payment and the agreed terms and conditions. There was therefore nothing (on) record to bind Tangkas Hadapan even though it had received a huge sum of money from the respondent; F
- (5) Nowhere in the JVA or in any document is it stated that the payment was to be converted from a commitment fee originally to a capital contribution; G
- (6) There was simply no evidence in support of the assertion that the initial payment meant to secure the Kelantan project, which was successful with the entering into of the JVA, was then treated and regarded as the respondent's contribution to the Kelantan project that was to be refunded before distribution of profits; H
- (7) The burden of proving these assertions in their own defence was on the appellants; I
- (8) PW2, a Forensic Investigative Accountant with Alliance IFA (M) Sdn Bhd specialising in forensic investigation, was appointed by the respondent company to investigate irregularities, testified he found the appellants released the sum of RM2 million on 11 March 2004 without any sort of legal documentation or written assurance from Tangkas Hadapan pertaining to the receipt of the said payment, and without any

- A evidence from Tangkas Hadapan that they had contributed a similar amount, nor is there any mention in the SCA that the sub-contractors had already invested RM4 million as initial capital to secure the contract;
- B (9) Though PW2 had wrongly refused to tender the forensic report, PW2 had given full and direct oral evidence of his observations and findings;
- (10) The haste in releasing the money to Tangkas Hadapan without taking any steps to safeguard the interests of the respondent disclosed, in my view, not only negligence but a lack of *bona fide* on the part of the appellants; and
- C (11) Both defendants were unable to provide any or reasonable explanation why this huge amount was paid at that point in time without board approval and for a doubtful purpose.
- D (d) The law on director's fiduciary duties:
- (i) *Halsbury's Laws of Malaysia*, vol. 13 pp. 230 to 223 - the duty to act honestly, and to use reasonable diligence in the discharge of his duties;
- E (ii) An act done deliberately disregarding knowledge that it is not in the company's interest is not *bona fide*;
- (iii) The duty to act honestly includes the duty to act in the interest of the company; and
- F (iv) The book *The Companies Act of Malaysia: An Annotation* by Walter Woon & Andrew Hicks on the test as to acting in the company's interest.
- (e) Decision and reasoning.
- G [11] With respect, the fact of making payment of RM2 million on 11 March 2004 without a director's resolution authorising the same became immaterial when the shareholder's resolution made on 26 October 2004 authorised the execution of the JVA, which was signed on the same date. There is no evidence that Tangkas Hadapan denied receiving the money. Indeed the fact the JVA came into being and the respondent company commenced work and progress claims were submitted, makes it self-evident that the payment played a role to lead to the JVA and the respondent company obtaining work. The problem was not a dispute as to whether RM2 million was paid according to the JVA, but arose when the progress payments from the JKR, put into the project account was diverted by the
- H main contractors contrary to their sub-contract agreement with Tangkas Hadapan. In the fall out from Tangkas Hadapan ceasing to proceed with the main contractors, the JVA between the respondent company and Tangkas Hadapan came to nought. There is no evidence and it is not the respondent
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company's case that even if the JKR progress payments were not diverted by the main contractors, the joint venture with Tangkas Hadapan would have failed. In the circumstances, the High Court clearly misappreciated the evidence before it and came to a finding it could otherwise not have made.

[12] We endorse the statement extracted from the book *The Companies Act of Malaysia: An Annotation* by Walter Woon & Andrew Hicks and reproduced in the judgment of the High Court that:

... It is not for the court to gauge what the interest of the company are. It has been said that "directors must exercise their discretion *bona fide* in what they consider - not what a court may consider - is the interests of the company"; *Re Smith & Fawcett Ltd* [1942] Ch 304, 306 per Lord Greene MR (Court of Appeal, England); accepted by the Court of Appeal in *Cheong Kim Hock v. Lin Securities (Re)* [1992] 2 SLR 349 (Court of Appeal, Singapore). The courts do not sit as courts of appeal over decisions of management. As Lord Wilberforce put it in *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821, 832 (House of Lords):

Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if *bona fide* arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

This is judicial recognition of the fact that different people can have different opinions about what is good for a company and in its interests. Directors may take risks with the company's property where they honestly believe that to do so is in the company's interest: *Cheam Tat Pang v. PP* [1996] 1 SLR 541, 561 (High Court, Singapore). This is indeed the essence of entrepreneurship. Just because a director makes a wrong decision does not mean that he breached his fiduciary duty to the company. The above *dicta* imply that the test is subjective and that the courts will not interfere in a management decision.

[13] Doing business is not for the naive. It is trite that doing business always involves an element of risk. It is equally trite that the cost of eliminating all risk may well result in no profit left to be made. The fiduciary duties of directors are not so naively constructed that they are not only duty bound to take no risk, eliminate all risks but also must only ensure profits. Nor it is intended that the courts should become forums of appeal on business decisions.

[14] Although the High Court did refer to the correct law as to the fiduciary duties of directors to act honestly, to use reasonable diligence, and in *bona fide* manner in the best interests of the company, the High Court allowed itself to be led astray by making the assessment upon hindsight. There is no

- A evidence that at the time they made the payment, it was a risk they should never have taken. Successfully obtaining the joint venture and commencing works on the JKR project, and the fact that there is no evidence that Tangkas Hadapan sought payment for contribution under the JVA whilst denying the earlier payment, provides no basis to hold the appellants did not act honestly
- B or were not acting in the best interests of the company. There is no evidence that they acted dishonestly to siphon out the respondent company's money, or did not use reasonable diligence in carrying out their duties as directors. All that is before the court is that they paid out RM2 million to Tangkas Hadapan to secure the contract. That the contract was awarded to the main
- C contractors and a sub-contract was entered into with Tangkas Hadapan, and for the performance of which the respondent company obtained a joint venture with Tangkas Hadapan eliminates any folly that may be attributed to making the payment without first ensuring the money went to the proper parties and a joint venture entered into. There was neither reason nor
- D evidence advanced that had the Tangkas Hadapan SCA with its main contractors proceeded as according to their agreement, that the JVA between the respondent company and Tangkas Hadapan could still not have proceeded on terms as agreed.

- E [15] Accordingly, we allowed the appeal, set aside the order of the High Court, fixed costs in the sum of RM40,000 here and below, and refunded the deposit to the appellants.

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